

Passavant Retirement & Health Center and General Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 538 a/w International Brotherhood of Teamsters, AFL-CIO. Case 6-CA-28468

April 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Pursuant to a charge filed on September 16, 1996, the General Counsel of the National Labor Relations Board issued a complaint on October 18, 1996, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 6-RC-11094. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On March 10, 1997, the General Counsel filed a Motion for Summary Judgment. On March 12, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On April 16, 1997, the Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer and response the Respondent admits its refusal to bargain,¹ but attacks the validity of the certification on the basis that some of the licensed practical nurses are supervisors within the meaning of Section 2(11) of the Act; that a unit limited to licensed practical nurses is inappropriate; that the underlying Decision and Direction of Election is contrary to *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994); and that the significant turnover in unit personnel between the election and the tally of ballots on which the Certification of Representative was based raised doubts as to the Union's claim of majority status.

¹The Respondent, in its answer, admits that it replied to the Union's request to initiate bargaining by letter dated August 23, 1996, which states, inter alia, "we are advised that . . . you have requested the initiation of bargaining for the LPNs. . . . Please be advised that [the Respondent] does not agree to engage in such bargaining at this time." In its answer, the Respondent denies the allegation that it refused to bargain, stating that par. 10 of the complaint is a conclusion of law to which no answer is required and denying factual averments deemed to be contained in that paragraph. We find, on the basis of the Respondent's statements in its answer, that it refused to bargain.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.² The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and facility in Zelienople, Pennsylvania, has been engaged in the operation of a nursing home and continuing care retirement community. During the 12-month period ending August 31, 1996, the Respondent, in conducting its business operations, derived gross revenues in excess of \$100,000 and purchased and received at its Zelienople, Pennsylvania facility goods valued in excess of \$5000 directly from points outside the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held November 18, 1994, the Union was certified on June 25, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time licensed practical nurses, including licensed practical nurse charge nurses employed by the Respondent at its

²We note in this regard that the Respondent failed to raise its contentions regarding delay and turnover in the representation proceeding by filing objections following the tally of ballots on June 21, 1996. Moreover, employee turnover is not the kind of "unusual circumstance" within the meaning of the Supreme Court's decision in *Ray Brooks v. NLRB*, 348 U.S. 96 (1954), that would permit rebuttal of the Union's majority status or warrant reexamination of certification. See *NLRB v. Action Automotive*, 284 NLRB 251 (1987), enf'd, 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989); and *Murphy Bros., Inc.*, 265 NLRB 1574 (1982).

³Chairman Gould and Member Higgins did not participate in the underlying representation case. However, they agree that the Respondent has raised no new issues in this "technical" 8(a)(5) case.

Zelienople, Pennsylvania facility; excluding registered nurses, head nurses and guards, other professional employees and other supervisors as defined in the Act and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

In about August 1996, the Union requested the Respondent to recognize and bargain with it as the exclusive collective-bargaining representative of the unit, and, by letter dated August 23, 1996, the Respondent refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after August 23, 1996, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Passavant Retirement & Health Center, Zelienople, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with General Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 538 a/w International Brotherhood of Teamsters, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time licensed practical nurses, including licensed practical nurse charge nurses employed by the Respondent at its Zelienople, Pennsylvania facility; excluding registered nurses, head nurses and guards, other professional employees and other supervisors as defined in the Act and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Zelienople, Pennsylvania, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 6 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 16, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to bargain with General Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 538 a/w/ International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time licensed practical nurses, including licensed practical nurse charge nurses employed by us at our Zelienople, Pennsylvania facility; excluding registered nurses, head nurses and guards, other professional employees and other supervisors as defined in the Act and all other employees.

PASSAVANT RETIREMENT & HEALTH
CENTER